IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Estate of: JACK DELGUZZI, DECEASED.	No. 36682-7-II UNPUBLISHED OPINION

Houghton, J. — In this third appeal related to the administration of the estate of Jack DelGuzzi (Estate), who died in 1978, Sidney Shaw, the personal representative of the estate of Gary DelGuzzi, Jack DelGuzzi's late son, claims that everyone who has administered the Estate has harmed it. He argues that the trial court erred in closing the Estate and in entering an order changing venue without consolidating two lawsuits. We affirm the trial court's 2007 order to close the Estate and dismiss the remaining issues presented for review as untimely.

FACTS

A. Gary DelGuzzi's Complaint

When Jack DelGuzzi died in 1978, his will appointed his son, Gary DelGuzzi,[1] personal

[1] Both Jack and Gary DelGuzzi have now died. To avoid confusion because there are now two DelGuzzi estates, we use Gary's first name. The same use of a first name applies for William Wilbert, a former administrator of the Estate; Loretta Wilbert, the current representative of William's estate; Margaret Shaw, a past personal representative of Gary's estate; and Sidney Shaw, the current personal representative of Gary's estate and an appellant.

representative of his Estate. Gary served as personal representative until August 13, 1982, when he resigned and William took over. In 1994, Gary sued William in Clallam County Superior Court. The complaint alleged that William, who was a real estate agent and developer, breached his fiduciary duty, engaged in self-dealing, and failed to account for Estate assets. Gary sought an accounting and the return of any improper fees, charges, and distributions. Gary amended his complaint several times, but the matter never went to trial.

Gary's second amended complaint, dated September 14, 1994, named additional defendants, including William's children. This complaint sought orders to void transfers of Estate assets to William, his family members, and their related corporate entities, and to remove William as personal representative. All of his children performed services for the Estate and received compensation for their work. These services included real property sales, property development, property management, appraisal work, and clerical and administrative services. In addition to cash payments for commissions and fees, at least one of the children received two parcels of real property from the Estate as compensation.

Gary filed another amended complaint on July 16, 1996 (July 1996 complaint). It separated his causes of action. One cause (damages petition) alleged tort claims against William for (1) various breaches of fiduciary duty, (2) violation of a court order requiring reporting and

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Gary died in 2004. Margaret served briefly as Gary's estate's personal representative but died in August 2004. Her husband, Sidney, then replaced her.

William died in 2004. Loretta Wilbert serves as William's personal representative. Loretta is a respondent.

After William's death, David Martin served briefly as the Estate's administrator. Retired Judge Gary Velie replaced Martin for a short time, starting in October 2004. The trial court appointed Kathryn Ellis, a respondent, on January 13, 2005.

approval of administrative fees, (3) using sham corporations to conceal Estate transactions, (4) improperly borrowing separate trust fund assets to pay Estate liabilities, and (5) failing to close the Estate in a timely manner.[2] In his damages petition, Gary requested an order setting a trial date on damages, but no date was set. The other cause of action (removal petition) requested orders removing William, requiring him to render an accounting, appointing a successor administrator, and for other related relief. The trial court set an evidentiary hearing on the motion to remove William for January 21, 1997.[3]

During fall 1996, the parties served interrogatories and requests for production on each other. Gary responded to William's interrogatories with a four-page list of objections. William

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[2] We describe the July 1996 complaint based on *DelGuzzi v. Wilbert*, noted at 108 Wn. App. 1003, 2001 WL 1001082. No party attached the July 1996 petition and complaint to briefing, nor did any party provide an accurate record citation for this document.

We note that an unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *Island County v. Mackie*, 36 Wn. App. 385, 391 n.3, 675 P.2d 607 (1984). Unpublished cases can also be cited to establish facts in a different case that are relevant to the current case involving the same parties. *In re Pers. Restraint of Davis*, 95 Wn. App. 917, 920 n.2, 977 P.2d 630 (1999), *aff'd*, 142 Wn.2d 165, 12 P.3d 603 (2000).

Loretta provided an additional complaint against her as Appendix 10 to her brief. She states, "The allegations in th[is] suit are similar to those in the July 1996 Petition." Loretta Br. at 12. The allegations included that William (1) engaged in improper self dealing with the Estate; (2) abused his fiduciary relationship; (3) acted only to benefit him, his family, and his own businesses; (4) used assets from the Estate to fund business ventures in Costa Rica and Panama and shielded information and accounting related to these venture from Estate beneficiaries; (5) never provided an accurate inventory and accounting of the Estate; (6) wrongfully disposed of assets at less than fair market value; and (7) improperly retained real estate commissions.

[3] William later moved for a hearing on his final report and petition for decree of distribution after filing an order of solvency, inventory of appraisement of the Estate assets, and comprehensive accounting of the Estate. The trial court entered a stipulated order setting this hearing for the same dates as the previously set hearing on the removal petition. After conducting hearings, the trial court entered a decision, which we discuss in more detail in this opinion.

moved to compel responses to his interrogatories. Gary submitted 36 pages of answers and objections, providing some response to all of William's 85 interrogatories; many of Gary's responses did not provide the requested information. Gary asserted that he could not produce all the requested information and documents because William had the information and William had failed to provide Gary's requested discovery.

William moved for sanctions under CR 11 and CR 37(d), claiming that Gary had provided evasive and misleading discovery. Gary moved to compel discovery, claiming that William had failed to respond to interrogatories, had denied the existence of business records for many of the Estate's corporate assets, and had failed to produce source documents (such as bank statements, check registers, deposit books, and cash journals) for Estate reports and accountings. The trial court set both motions for hearing on January 17, 1997.

At the January 17, 1997 hearing, the trial court granted William's motion for discovery sanctions against both Gary and his attorney, Charles Cruikshank. The trial court found Gary's interrogatory answers evasive, ordered Gary and Cruikshank to pay $30,000 in attorney fees and costs to William, and dismissed Gary's claims as a CR 37(d) sanction. The trial court based its ruling on Gary's initial four-page objection to William's interrogatories, which William had included with his sanctions motion. The trial court did not consider Gary's later-produced 36 pages of answers and objections. Nor did it consider or rule on Gary's motion to compel discovery.

B. Estate Administration

On January 21, 1997, a different trial court than the one overseeing the July 1996

complaint litigation conducted an evidentiary hearing limited to William's final report[4] and accounting for the Estate. Neither that judge nor any other judge conducted a hearing on Gary's motion to compel discovery because the previous judge had dismissed Gary's July 1996 complaint against William under CR 37(d). The trial court entered a memorandum decision on the final report on October 16, 1997. This order stated that "[i]t appears to this Court, having heard the testimony and reviewed the documents . . . that this Estate is ready to be settled and closed." Clerk's Papers (CP) at 1967. The trial court asked the parties to draft an agreed distribution plan. The parties did not reach agreement, so on June 5, 1998, the trial court entered an order to close the Estate, to set up a distribution plan, and to set up a plan to handle expenses (1998 closing plan).

C. First Appeal and Remand

Gary appealed both the discovery-sanction dismissal of his July 1996 lawsuit for wrongful Estate administration and William's attorney fee award. We reversed the discovery-sanction dismissal of Gary's claims against William and Cruikshank. We affirmed CR 11 sanctions against Gary for his claims against William's children. Nevertheless, because the lower court had not specified what pleading, interrogatory answers, or objections had violated CR 11, we reversed the attorney fee sanction arising from Gary's inadequate responses to William's discovery requests. *In re Estate of DelGuzzi*, noted at 93 Wn. App. 1048, 1999 WL 10081 (*DelGuzzi* I).

We also held, however, that CR 37(d) permits monetary sanctions for failure to respond to discovery. Accordingly, we noted that on remand, the trial court could impose a CR 37(d)

[4] The trial court held hearings on the final report on January 21-23 and March 24-25, 1997.

sanction for reasonable expenses that William incurred "as a result of [Gary's] failure to respond properly to discovery." *DelGuzzi* I, 1999 WL 10081 at *9.

On remand, William asked the trial court to reinstate the attorney fee sanctions against Gary and Cruikshank under CR 37(d). The trial court granted the request and re-imposed a $30,000 sanction, plus $7,650 in interest. Gary again moved to compel discovery. William urged the trial court to dismiss Gary's claim, this time based on res judicata, collateral estoppel, and law-of-the-case doctrine. William argued that, although Gary's wrongful Estate administration claims had originally been dismissed as a discovery sanction, Gary was nevertheless barred from relitigating them on remand because the same issues had been decided in the probate hearings leading up to the trial court's issuance of the 1998 closing plan.

A different superior court judge again dismissed Gary's claim, reasoning that at the 1997 hearings on William's final report and accounting for the Estate, Gary had adequate opportunity to raise all claims and he did not prevail. The trial court reasoned that at the previous probate proceeding the superior court found William's administration fees reasonable and that the personal representative did not breach his fiduciary duty to the Estate (including fraud and self-dealing claims). The trial court did not address how Gary could have effectively mounted a challenge to the Estate's administration without the fulfillment of his discovery requests.

D. Second Appeal and Remand

Gary appealed the dismissal of his July 1996 petitions for William's removal as the personal representative and for damages and the imposition of discovery sanctions on remand from the first appeal. As to the petitions, he argued that the trial court erred in dismissing them

on grounds of res judicata, collateral estoppel, and the law-of-the-case doctrine. As to the sanctions claim, he argued that the trial court failed to follow our remand instructions.

In the second appeal, we agreed with Gary on both claims because the record did not show that the trial court evaluated Gary's discovery objections and responses to determine whether he failed to comply with William's discovery requests and what reasonable expenses William incurred, if any, as a result of any failure to comply. Accordingly, we reversed the trial court's re-imposition of monetary sanctions and remanded for further action on Gary's petitions. *DelGuzzi v. Wilbert*, noted at 108 Wn. App. 1003, 2001 WL 1001082 (*DelGuzzi* II).

E. Present Appeal

The trial court appointed bankruptcy trustee, Kathryn Ellis, as the Estate administrator on January 13, 2005. The order appointing Ellis directed her to liquidate any remaining Estate real estate parcels and to submit an updated accounting. The order also prohibited her from pursuing claims against William (now his estate). Acting according to these limited duties, Ellis liquidated the remaining properties and distributed the proceeds. No one objected to the sales. She obtained an order to close the Estate on July 27, 2007 (2007 closing order).

After Gary's and William's deaths, Gary's attorney, Cruikshank, moved to substitute their estates' personal representatives as parties in the pending case stemming from the July 1996 complaint. The trial court granted the motion. Between 2004 and 2007, Cruikshank filed motions and discovery requests. As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved.

In August 2004, Cruikshank filed a notice of creditor's claim in William's King County

probate. Loretta rejected the claim in 2006. Sidney filed suit in Clallam County in December 2006 (2006 case). According to both Loretta and Cruikshank, the claims in this matter resemble the claims in the July 1996 case.[5]

Loretta moved to change venue in the 2006 Clallam County case to King County. Cruikshank moved to consolidate the 1996 case with the 2006 case. In late 2007, Loretta obtained a change of venue of the 2006 case to King County; the venue order does not discuss consolidation.[6]

Sidney appealed, arguing that the trial court erred in entering its 2007 closing order. By an amended notice of appeal, he further argues that the trial court erred in ordering a change of venue without consolidating the two cases.

ANALYSIS

Timeliness of Appeal

A. The 1998 Closing Plan

As a preliminary matter, Ellis, the court-appointed administrator, argues that the 1998 closing plan approved by the trial court was a final order and cannot be appealed at this late date.[7] Due to the unique procedural history of this matter, we disagree that the order was final at the

[5] We agree with Ellis that the claims raised in the removal petition are moot due to William's death; only the damages petition remains potentially viable. See footnotes 2 and 19, herein, for further discussion.

[6] In April 2008, Martin moved to amend the 2006 complaint, substituting himself for Sidney based on Martin's having purchased the claims from Sidney. At the time of argument, this motion remained pending.

[7] RAP 5.2(a) requires an appeal be filed within 30 days of the entry of the trial court's order.

time it was entered but agree that it is no longer appealable due to the entry of subsequent final and appealable interim distribution orders.

On December 17, 1996, William filed a final report and petition for decree of distribution under RCW 11.76.030, which sets out the procedure for court approval of a final report and petition for distribution. After taking evidence on the petition, the trial court issued a decision that the Estate was ready to be closed and asking the parties to reach an agreement on distribution. The decision addressed challenges to the Estate's administration. For example, it specifically limited one of William's administration fee claims for real estate commissions to no more than $130/hour and disallowed expenses related to transactions and property in Costa Rica because William "breach[ed] his duty to the Estate as administrator in that he put himself in a situation where his self-interest could potentially conflict with the Estate." CP at 1970. The parties did not reach agreement, so the trial court issued the 1998 closing plan.

The 1998 closing plan addressed "the administrator's Final Report and Petition for a Decree of Distribution." CP at 1959. The order approved certain administrator, attorney, and accountant fees; listed assets remaining in the Estate; and directed how to dispose of real property and liquidate corporate entities remaining in the Estate. It also authorized distributions to the administrative claimants to satisfy the approved claims so long as sufficient assets remained in the Estate to carry out the distribution and closing plans. The last paragraph of the closing plan stated, in a handwritten addendum, "This order is entered as a final order on this day." CP at 1964.

Ellis relies on RCW 11.76.030, which sets out what constitutes a final report required to

close an estate. Ellis contends that the 1998 closing plan qualified as a final report and that the "an order approving a Final Report of an administrator in a probate proceeding is a final order." Ellis Br. at 8. Because Gary did not appeal the 1998 closing plan, Ellis asserts that "it is final and res judicata" on "all matters covered" and "all questions that should have been raised" at the time of the hearing. Ellis Br. at 9-10.

Ellis further argues that the 2005 and 2006 distribution orders (collectively, the interim distribution orders), made in accordance with the closing plan, were also final orders for the purposes of the appeal period. She states that all parties had notice of these interim distributions, that the trial court considered and rejected objections, and that the orders should have been appealed when entered. Consequently, she contends that the only issues we should consider in this appeal are those arising out of the 2007 closing order.

Sidney counters that by asserting a jurisdictional ground, Ellis attempts to distract us from properly appealed issues. He also asserts that in 2001, we recognized that Gary had been unable to litigate issues in 1996 and 1997, that in 2004 he learned of important facts only after William died and that we should not deprive him of the ability to fully litigate his claims related to the Estate's administration.

Ellis relies on *Batey v. Batey*, 35 Wn.2d 791, 215 P.2d 694 (1950), to support her argument that appeal of issues related to the 1998 closing plan are untimely. *Batey* explains that

> [t]he order of the probate court approving the guardian's final account is a final judgment and is entitled to the same consideration as any final judgment entered by the superior court.
>
> Our decisions to this effect are referred to in *Ryan v. Plath*, 18 Wn.2d 839, 140 P.2d 968, 977 [1943], where this court said: "Appellant recognizes the settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice provided by statute are final adjudications

> having the effect of judgments *in rem* and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. See the following recent decisions of this court upon this question, and the many prior decisions cited therein: *Farley v. Davis*, 10 Wn.2d 62, 116 P.2d 263 . . . [1941]; *Castanier v. Mottet*, 14 Wn.2d 615, 128 P.2d 974 [1942]; *In re Christianson's Estate*, [16] Wn.[2d 48], 132 P.2d 368 [1942]."

35 Wn. App. at 796 (some alternations in original). *See also Manning v. Mount St. Michael's Seminary of Philosophy & Science*, 78 Wn.2d 542, 548, 477 P.2d 635 (1970) ("This court has often said that orders and decrees of distribution made by superior courts in probate proceedings . . . are conclusive and binding upon all persons having any interest in the estate and upon all the world as well."); *Bostock v. Brown*, 198 Wash. 288, 292, 88 P.2d 445 (1939) (providing that an order approving a final report and distribution is "res judicata of all matters covered by that order and all questions that should have been raised at the hearing upon the final account and petition for distribution"); *In re Ostlund's Estate*, 57 Wash. 359, 364-66, 106 P. 1116 (1910) (determining that a probate court decree distributing property is final).

Sidney primarily relies on *In re Peterson's Estate*, 12 Wn.2d 686, 123 P.2d 733 (1942), to support his argument. Sidney asserts that according to *Peterson*, interested parties can contest distribution orders or periodic reports at any time. 12 Wn.2d at 716. In *Peterson*, the court noted that

> [t]he order with which we are here concerned, however, was not an interim order, nor did it partake of the nature of such an order. It purported to be a *final* order fixing the entire allowance for fees over and above what had already been allowed some years before. No such order should have been made, nor should ever be made, prior to the final accounting, for it is then that all the interested parties are given notice according to the statute and have the right to be heard upon all matters affecting the administration and distribution of the estate.

12 Wn.2d at 717. Sidney argues that the 1998 closing plan was either an interim order and not a

final order under RCW 11.76.030, or a final order that should not have been entered.

The 1998 closing plan was entered under RCW 11.76.030. Although the law is settled on the finality of orders entered under RCW 11.76.030, the peculiar circumstances of this case weigh against our simply finding the 1998 closing plan appealable as a final order at the time it was entered. *E.g.*, *Batey*, 35 Wn.2d at 796.

Days before the hearing on the closing plan on January 21, 1997, the trial court dismissed Gary's claims against William for improper administration of the Estate as a sanction under CR 37, and we reversed this decision and remanded. *DelGuzzi* I, 1999 WL 10081 at *3, 5-6. On remand, the trial court "again dismissed [Gary's] claim, reasoning that at the January 21, 1997, hearing on [William]'s final report and accounting for the estate, [Gary] had adequate opportunity to raise any and all claims and had lost." *DelGuzzi* II, 2001 WL 1001082 at *3.

In the second appeal of the dismissal, in 2001, we wrote,

> [William] contends that res judicata bars [Gary's] claims because [Gary] had a chance to litigate fully those claims in the Final Accounting hearing of January 21, 1997. The record is to the contrary. Because another judge had dismissed [Gary's] wrongful-estate administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to [William's] final accounting of the estate. [Gary] neither presented nor had an opportunity to present his claims at that hearing.

DelGuzzi II, 2001 WL 1001082 at *7.

We based our decision that the second dismissal was improper on a number of factors. First, because the claims had already been dismissed by the time of the hearing on the closing plan, Gary had no claims before the trial court for it to rule on. *DelGuzzi* II, 2001 WL 1001082 at *7. "Second, although at the Final Accounting hearing, [Gary] could have alleged that [William] had

breached his fiduciary duties, [Gary] had no evidence to support such allegations" because the trial court had previously denied compelling answers to his discovery requests. *DelGuzzi* II, 2001 WL 1001082 at *7. Consequently, "because he could not compel discovery and because he no longer had an active claim, [Gary] could not have offered crucial evidence in the previous proceeding to establish the necessary facts underlying his dismissed claims." *DelGuzzi* II, 2001 WL 1001082 at *7. We will not disturb this reasoning in the appeal now before us.

B. Interim Distribution Orders Entered Pursuant to 1998 Closing Plan

Even assuming that the 1998 closing plan could not be appealable as a final order when entered, however, we still must decide whether it is proper to address Gary's (now Sidney's) appeal in 2009, eleven years after the entry of the 1998 closing plan. Ellis argues that the interim distribution orders made under the terms of the closing plan cannot now be appealed. We agree that these orders were final when entered and Sidney cannot now raise issues on appeal that arose before the entry of the second interim distribution order, on June 2, 2006.

In 2005, Ellis moved to approve a disbursement to the administrative claimants. Sidney objected and requested that the trial court deny the disbursement, order a constructive trust on all assets until "the Estate of Gary DelGuzzi has been fully compensated for its property that has been converted, disappeared or gone missing during the probate," deny motions to quash subpoenas for estate records, allow the parties to meet to resolve some procedural issues, and set the matter for trial.[8] The trial court granted the motion for the disbursement and quashed the

[8] In the earlier appeals, we determined that Gary had been unable to fully pursue his claims due to discovery issues. *DelGuzzi* II, 2001 WL 1001082 at *7. In the current appeal, however, Sidney's attorney, Cruikshank, states that he received a "big discovery break" in 2004, after William died and Martin temporarily served as the administrator for the Estate. Cruikshank Reply Br. at 11, 5.

subpoenas. Sidney did not appeal.

Ellis filed an annual report in January 2006, summarizing fund distributions and properties sold. She filed a second interim distribution motion on May 18,[9] 2006, again to make a distribution to the administrative claimants. The trial court approved the distribution on June 2, 2006. Sidney did not appeal.

Ellis cites *Tucker v. Brown*, 20 Wn.2d 740, 800, 150 P.2d 604 (1944), for the proposition that "interim orders made during the course of probate after notice of the hearing are final in their nature and cannot be attacked or litigated at the hearing upon the final report." Sidney counters, citing *Peterson*. That case is inapposite.

The trial court entered its order in *Peterson* on an ex parte basis. Our Supreme Court refused to declare the order final and appealable in part because the affected parties had not been notified and, thus, could not object. *Peterson*, 12 Wn.2d at 717-18. Here, in contrast, Gary (and later, Sidney) does not argue lack of notice or opportunity to object as to any order. Moreover, as noted, multiple cases stand for the proposition that probate distribution orders made with proper notice and opportunity to object are final and appealable when entered. *Manning*, 78 Wn.2d at 548; *Batey*, 35 Wn.2d at 796; *Bostock*, 198 Wash. at 292; *Ostlund*, 57 Wash. at 364-66.

In order to determine the finality of the 2005 and 2006 orders, we must decide whether

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We note that this "big discovery break" occurred *before* the trial court entered the 2005 distribution order, such that issues related to Gary's earlier alleged inability to pursue his claims do not control here. *See also Shaw v. Short, Cressman & Burgess, PLLC*, noted at ____ Wn. App. ____, 2009 WL 1366272, at *4 (stating that Shaw knew or should have known of alleged irregularities prior to 2004).

[9] When Sidney moved to close the Estate on May 8, 2006, he did not raise any issues of administrator incompetence.

an order that the parties consider an "interim" order, contemplating further action (as opposed to an order that closes an estate), can be a final order. Here, the trial court entered the 2005 and 2006 interim distribution orders pursuant to the 1998 closing plan and neither order fully dismissed the action.

As noted, the *Tucker* case addresses orders issued by a trial court in probate matters. 20 Wn.2d at 800-01. In that case, an administrator filed an accounting and report on December 15, 1937, but the action remained open. *Tucker*, 20 Wn.2d at 794. The court recognized the legal rule that "interim orders made during the course of probate after notice of the hearing are final in their nature." *Tucker*, 20 Wn.2d at 800. Although the *Tucker* court did not find the 1937 order final on factual grounds, it repeated "[t]here can be no quarrel" with the legal rule of finality. 20 Wn.2d at 800; *see also In re Merlino's Estate*, 48 Wn.2d 494, 496, 294 P.2d 941 (1956) (stating that "[a]n interim order made during the course of probate, after notice of the hearing, is final in its nature"); *In re Krueger's Estate*, 11 Wn.2d 329, 351, 119 P.2d 312 (1941) (determining that interim order of approval of periodic report of estate estops those with notice of the proceedings from "objecting thereto at the final hearing").

We apply this probate rule here and note that, but for the peculiar procedural background of this case discussed in the second appeal, the 1998 closing plan would have been final at the time it was entered. This is because the parties had notice and an opportunity to challenge the closing plan order. Further, the order addressed the propriety of William's administration, analyzed past distributions, and set up a plan for future distributions.

When we view the 2005 and 2006 interim distribution orders in conjunction with the 1998

closing plan, we see that the interim distribution orders became final when entered. That is, because Sidney had notice of the interim actions and, in fact, filed a full objection to the 2005 proposed distribution that addressed the underlying problems that he identified with the overall administration of the Estate, the orders became final when entered.[10]

Thus, the only issues Sidney can raise in this third appeal are those arising out of Ellis's actions taken between the date of the 2006 interim distribution order through the 2007 final closing order. We now address Sidney's challenges to the 2007 final closing order.[11]

The 2007 Closing Order

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[10] Moreover, as discussed in footnote 8, herein, the alleged restrictions on the representative's inability to fully pursue claims against William (or his estate) that arguably existed in 1998, no longer existed by 2005.

[11] After oral argument, Sidney filed supplemental documents retrieved from earlier DelGuzzi appeal archives to further address Ellis's arguments regarding the appealability of the 1998 closing plan and the interim distribution orders. The documents include a notice for discretionary review dated July 19, 2004; a ruling denying review; a second motion dated November 5, 2004, with additional documents related to that motion, including a ruling denying review.

The July 19, 2004 motion sought to appeal the trial court's continuance of a hearing Margaret requested on motions to appoint an administrator for the Estate, to vacate the 1998 closing plan, and for other relief. Our commissioner denied review on the grounds that the trial court had "not yet made a decision or entered an order" granting or denying the requested relief. Commissioner's Ruling (July 29, 2004) at 3.

The November 5, 2004 motion sought review of an order denying partial summary judgment to Margaret via an order to show cause. In the trial court, Margaret sought summary judgment on portions of the claims presented in the July 1996 complaint. The commissioner denied the motion because "[t]his court has been provided very little record and cannot fairly review the trial court's decision," and because factual disputes remained with respect to certain allegations, making summary judgment inappropriate. Commissioner's Ruling (Nov. 5, 2004) at 2-3.

Neither of these motions for discretionary review concern the interim distribution orders (both motions were submitted before the interim distribution orders were issued). Further, the motion that references the 1998 closing plan appeals only an alleged scheduling error. Consequently, these supplemental authorities have no impact on our analysis of the appealability of the 1998 closing plan or the interim distribution orders.

Ellis filed a supplemental report on June 11, 2007, and the trial court entered an order approving the final distribution, closing the case on submission of certain receipts, and discharging the bond of the personal administrator. The 2007 closing order also addressed a $15,643.45 distribution and the disposition of a parcel of real estate. This order is appealable.

A. Standards of Review

In general, because proceedings for probate of wills are equitable, we review the record de novo. *In re Estate of Black*, 116 Wn. App. 476, 483, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). *Black*, however, sets out a more lenient standard of review for the award of attorney fees in probate:

> RCW 11.96A.150 gives the court discretionary authority to award attorney fees from estate assets. And we will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion. Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. Because of the "almost limitless sets of factual circumstances that might arise in a probate proceeding," the legislature "wisely" left the matter of fees to the trial court, directing only that the award be made "'as justice may require.'"

116 Wn. App. at 489 (citations omitted).

Ellis asserts that she acted in accordance with the 1998 closing plan and that the trial court did not abuse its discretion in approving the closing of the Estate. Sidney disputes this assertion on numerous grounds.

B. Closing Procedure

Sidney first contends that Ellis failed to follow the procedures set forth in RCW 11.76.020 - .050 and RCW 11.28.240. Sidney argues that these statutory requirements are mandatory and that the trial court erred in closing the Estate.[12] In particular, he claims that

RCW 11.76.030, .040, and RCW 11.28.240 require that all devisees be named and informed of the closing, and RCW 11.76.030 also requires description of undisposed estate property.

These procedural issues relate to entry of an order to close an estate under RCW 11.76.030 and should have been fully litigated by Gary at the time the trial court entered the closing order under this statute in 1998. The 2005 and 2006 interim orders, as well as the 2007 closing order, all proceeded on the correct assumption that the trial court had entered a closing plan under RCW 11.76.030 in 1998.

Although, as previously discussed, we recognize that the 1998 closing plan could not have been final as to claims of William's incompetence, Sidney's predecessor could have previously litigated these procedural claims. In addition, in 2006, Sidney himself moved to close the Estate and he did not allege any procedural errors or administrator incompetence. His argument about Ellis's closing procedures fails.

C. Attorney Fees

Sidney next contends that Ellis failed to comply with the 1998 closing plan when paying fees to William and to the Short, Cressman & Burgess law firm.[13] The majority of Sidney's

[12] The parties do not clearly refer to the Estate as either closed or not closed. Sidney argues that the trial court erred in closing the Estate and that the Estate is not yet closed. Ellis states that she has not distributed the funds and property that were the subject of the 2007 final closing order. The 2007 closing order states that the Estate shall be closed upon the filing of receipts that show final disbursements have been made. As of oral argument before us on this current appeal, this had not been done.

We note that Division One observed that the Estate is closed. *Shaw v. Short, Cressman & Burgess, PLLC*, noted at ____ Wn. App. ____, 2009 WL 1366272, at *2 n.5. Because the probate court entered a closing plan and a closing order that the administrator has substantially complied with, and because the status of the Estate was not relevant to the Division One matter, we do not consider ourselves bound by this statement.

argument regarding fees, however, does not discuss these payments and, instead, argues that earlier payments under the 1998 closing plan intentionally, by private agreement, violated the 1:4 fee ratio set out in the plan.[14] To the extent that these objections regarding previous payments address events occurring *before* 2006, we do not entertain them. As previously discussed, this appeal may only raise issues occurring *after* the 2006 interim distribution order.

In 2007, Ellis distributed the following funds: $3,130.13 to William's estate and $2,343.97 to Short, Cressman & Burgess. Although Sidney attacks multiple earlier and larger payments to William and Short, Cressman & Burgess, he does not raise any specific assignment of error related to the two 2007 payments. Therefore, we do not address this argument because it has not been properly presented for review. RAP 10.3(a)(4), (6); *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008).

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[13] Short, Cressman & Burgess represented Gary and William in their capacity as personal representatives between 1982 and 1991. In 1994 and 1996, Gary asserted tort claims against the law firm. The trial court dismissed the claims based on lack of standing under *Trask v. Butler*, 123 Wn.2d 835, 845, 872 P.2d 1080 (1994), and Gary did not appeal. We granted Short, Cressman & Burgess leave to file an amicus brief in this matter concerning claims as to their attorney fees.

[14] Specifically, he argues that the 1998 closing plan set out a certain ratio of payments to two parties, William and Short, Cressman & Burgess, and that the parties subsequently entered into a private agreement for a different ratio in violation of the plan. The 1998 closing plan authorized the administrator to make pro rata distributions to the administrative claimants and stated, "[a]ny pro rata interim distribution shall be based on the ratio of the amount of each administrative claim to the total amount of all three administrative claims." CP at 1964.

Sidney observes that the 1998 plan payments for past work to William and Short, Cressman & Burgess resembled a 1:4 ratio, approximately $400,000 to Short, Cressman & Burgess and $1.6 million to William. Sidney alleges that in exchange for tolling the applicable statutes of limitations related to possible disputes between them, William and Short, Cressman & Burgess changed the payment ratio from 1:4 to 1:1. We note that the ratio of $3,130.13 to William's estate and $2,343.97 to Short, Cressman & Burgess is not 1:1 and that Sidney does not address whether these payments are within the specified ratio set out in the 1998 closing plan.

D. Receipt Filings

Sidney further contends that Ellis failed to file proof of receipts and disbursements as required by the 2007 closing order. The 2007 final closing order states "that this estate shall be closed upon the filing of receipts showing disbursement and distribution of the remaining property of this estate." CP at 1784-85. The remaining real property listed in the order and in the Ellis declarations was a piece of real estate known as "9999 Bumpy Rd, Port Angeles, WA," that Ellis proposed distributing to an administrative creditor in lieu of additional payment. CP at 268. A handwritten addition to the order addressed property that could not be profitably sold and allowed Ellis to dispose of the property for $1,200 if no fees or costs of the sale were paid by the Estate. The final cash in the Estate amounted to approximately $15,000, to be paid out to various administrative claimants as set out in Ellis's declaration.

It is apparent to us that Ellis cannot file the receipts because she states she has not yet made the final disbursements under the order. Thus, this argument lacks merit and we do not address it further.

E. Account for Property Sales

Sidney also contends that Ellis failed to account for various property sales during her administration. As discussed, the 2007 closing order covers only certain pieces of real property and a small sum of cash. Sidney argues extensively about other property sales and specifically challenges the sale of property known as "999 Three Sisters Road." Appellant's Amended Br. at 33. Ellis responds that this sale occurred in 2005 and was covered by the 2005 interim distribution order.

Sidney objected to the property sale in 2005, before the trial court entered the 2005 distribution order. The trial court ordered distribution of the proceeds of the property in the 2005 order and Sidney did not appeal. For the reasons previously discussed regarding the need to appeal the interim distribution orders at the time the trial court enters them, we do not address this issue.

F. Inventory and Appraisement

Finally, Sidney contends that Ellis failed to provide a verified inventory and appraisement. RCW 11.44.015, .025, and .050. Sidney requested an inventory and appraisement from Ellis in 2006. Specifically, he argued that, because William's prior inventory did not list certain properties that Ellis stated she had sold, she had a duty to re-inventory the missing parcels.[15]

Before Sidney filed a motion for an inventory, Ellis sent him a letter dated June 7, 2006, in which she stated that she did not believe a new inventory was needed but asked him to consider the letter as a new inventory and appraisement. She explained that the only remaining property in the Estate was the Bumpy Road parcel, that had a pending purchase offer of approximately $25,000. She added that she expected to receive an additional $4,500 from a secured promissory note. She attached tax returns to the letter.

Neither party mentions whether the trial court explicitly considered Sidney's 2006 motion. Nevertheless, Sidney cannot identify the harm Ellis caused by her alleged failure to further inventory and appraise unnamed properties. Neither does he request any remedy on remand for this alleged neglect. As stated in Ellis's letter, all parties knew of the Bumpy Road property and

[15] Sidney's motion did not identify the missing properties nor does he list them on appeal.

that she was not going to expend Estate funds preparing additional formal inventories and appraisements.

Any remedy for Ellis's failure to file an inventory is discretionary. *Clancy v. McElroy*, 30 Wash. 567, 568, 70 P. 1095 (1902) (stating that court has discretion to retain executor even when executor fails to file a required inventory in a timely manner). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *In re the Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

Here, the trial court did not abuse its discretion in not ordering an inventory or appraisement or otherwise penalizing Ellis because her letter sets out reasonable grounds for her decision not to prepare a new inventory and appraisement. *See* RCW 11.44.050; *Clancy*, 30 Wash. at 568-69.[16] The argument fails.

G. Change of Venue Order without Consolidation

Sidney next contends that the trial court erred in entering its change of venue order moving Sidney's 2006 claim to King County.[17] He asserts that the trial court also should have

[16] Sidney also contends that Ellis filed deficient bookkeeping records for the period 1997-2004. Sidney bases his argument on gaps in the accounting occurring up to 2004. As previously discussed, we do not address issues pertaining to actions prior to the 2006 interim order.

[17] The events leading up to the trial court's decision to move the 2006 case to King County do not clearly demonstrate that Sidney requested consolidation in conjunction with Loretta's November 2007 request to change venue. On November 2, 2007, Loretta moved to change the venue of the 2006 case to King County. The supporting materials indicate that Loretta unsuccessfully sought attorney Cruikshank's stipulation to the change. Cruikshank instead moved for a change of venue "and other relief" on October 26, 2007, two weeks before Loretta's motion was filed, but this "other relief" is not described. Loretta Br. Append. 11, at 3. In the record, there is also a motion dated October 19, 2007, in which Martin requested consolidation of the cases and a change of venue to King County.

Attached to Sidney's reply brief is a different, earlier motion prepared (but apparently not

consolidated the July 1996 and 2006 cases before moving them to King County. Otherwise, he asserts, that failure to consolidate the July 1996 case with the nearly identical 2006 case "makes an orphan of the 1996 . . . complaint" and we should not allow both matters to continue in two different counties. Appellant's Amended Br. at 37-38.

In December 2007, the Clallam County Superior Court changed venue of the 2006 case to King County. The order did not address consolidation of the 1996 and 2006 cases. By an amended notice of appeal, Sidney appeals the trial court's change of venue without also consolidating the two cases.

Sidney filed his initial notice of appeal, addressing the issues related to Ellis's administration and the trial court closing plan, on August 21, 2007. (Clallam County case No. 8087.) He filed an amended notice of appeal on January 9, 2008. The amended notice of appeal refers to Clallam County cause number 8087, but the order attached to the amended notice of appeal was entered in Clallam County cause number 06-2-01085-2, the 2006 case.

Loretta challenges our authority to review the consolidation issue. She argues that RAP 2.2 bars appeal of an interlocutory order as a matter of right. We agree.

Orders addressing venue as final judgments are not appealable under RAP 2.2. But a party who seeks to challenge venue and other key non-final issues may seek discretionary review under RAP 2.1(a)(2) and RAP 2.3, instead of waiting until a trial court issues a final order.

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filed) by Loretta discussing venue of the 2006 case *and* consolidation of the 2006 and 1996 cases. This motion requested consolidation of the 1996 and 2006 cases. This motion was noted for hearing on June 29, 2007, and is signed by Loretta's attorney, but it does not have a "filed" stamp and does not appear in the Clerk's Papers at 1416, as stated in the handwritten notation on the first page of the copy attached to the reply brief.

Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 577-78, 573 P.2d 1316 (1978); *Hauge v. Corvin*, 23 Wn. App. 913, 915-16, 599 P.2d 23 (1979); 14 Karl B. Tegland, Washington Practice: Civil Procedure § 6.26, at 174-75 (2003). Sidney did not seek discretionary review, and we decline to address this argument further.[18]

ATTORNEY FEES

Ellis requests fees and costs under RAP 18.9(a). She argues that because the Estate is administratively insolvent, the administrator and other professionals assisting with the Estate have been harmed by the costs of a frivolous appeal. We cannot say that the appeal is so lacking in merit as to be frivolous, and we decline to award attorney fees on that basis.

Affirmed in part (issues related to events arising between the entry of the 2006 interim distribution order and the 2007 closing order); and dismissed in part (time-barred issues[19] and the

[18] Loretta argues that other procedural irregularities require us to reject review of this issue. These include a claim that the trial court's consolidation order was entered in another matter, the 2006 case, and that Sidney attempted to consolidate a trial-level matter (the 2006 case) with an appellate matter (the underlying Estate administration, that was already on appeal at the time the trial court denied the consolidation request). Because we do not address Sidney's argument, we also do not address the other procedural claims that Loretta asserts.

[19] Sidney's amended opening brief identifies the following as problems with orders entered from 1982-2004: fees for estate administration that were greater than proven, fees paid to William even though he breached fiduciary duties, improperly document attorneys fees, overhead and expense reimbursements contrary to contracted amounts, improperly paid real estate commissions, improper interest on fees and expenses, interest payments on loans made to the estate that were the result of self dealing, and interest paid to attorneys in violation of a probate court order and fiduciary duties, unexplained payments. The brief provides additional detail of pre-2006 activities: (1) the estate made unjustified payments to the law firm of Chicoine & Hallett and other entities in the time period around 1993-1994; (2) Short, Cressman & Burgess and William, at some point before 1998, entered into an unauthorized "private agreement" to reapportion fees and harmed the estate because the agreement purported to toll any tort claims related to the estate as between these two parties, Appellant's Amended Br. at 19-21; (3) a report issued in 1996 (the Kleinman report) showed that William was overpaid for his work and received

appeal of the trial court's failure to order consolidation).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Hunt, J.

Van Deren, C.J.

unauthorized real estate commissions; (4) William's accounting of May 15, 1998, requested compensation for unexplained overheard and fees; (5) William sold a Malcolm Island property for significantly less than its actual value; (6) the 1998 closing plan miscalculated fees owed to Short, Cressman & Burgess; (7) loans should not have made to the estate by William and Short, Cressman & Burgess in the mid-1980s and that there was no business justification for the loans; and (8) the Kleinman report shows missing assets. As for administrator Ellis's early activities, Sidney claims she failed to investigate the above claims and that she did not properly account for various sales of property.

We note that many of these issues overlap with those in the still-pending July 1996 complaint, as described by the parties. *See* note 2, *supra* (describing 1996 action). We recognize that this opinion disposing of these issues has a preclusive effect on the unresolved July 1996 action.